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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HUBERT H. HUMPHREY, III, Attorney General of the State of Minnesota; MINNESOTA PUBLIC UTILITIES COMMISSION; and MINNESOTA DEPARTMENT OF PUBLIC SERVICE,

Petitioners,

vs.

NORTHERN STATES POWER COMPANY, and MINNESOTA PUBLIC INTEREST RESEARCH GROUP,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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QUESTION PRESENTED

Whether the Federal Power Act permits an electric utility to evade state regulation of its retail rates by separately incorporating part of its generation and transmission system in a wholly-owned subsidiary and obtaining Federal Energy Regulatory Commission approval of a cost sharing agreement between the utility and the subsidiary as a wholesale rate.

PARTIES TO THE PROCEEDINGS

Two of the petitioners named in the caption of this case, the Minnesota Public Utilities Commission and the Minnesota Department of Public Service, were parties to the proceeding in the Minnesota Supreme Court. The other petitioner, Minnesota Attorney General Hubert H. Humphrey, III, has, by amendment to the Minnesota Statutes, replaced the Minnesota Office of Consumer Services as the state's advocate for the interests of residential utility consumers. Minn. Stat. § 45.17, subd. 2 (Supp. 1983).

The real party adverse to the petitioners is Respondent Northern States Power Company. Though named as a respondent pursuant to Rule 19.6 of this Court, the Minnesota Public Interest Research Group aligned itself with the Petitioners in the Minnesota Supreme Court.

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The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Minnesota entered in this proceeding on January 27, 1984.

OPINIONS BELOW

The Opinion of the Minnesota Supreme Court issued on January 27, 1984, is not yet reported. The opinion is set out in the Appendix at p. A-1. The Judgment and Order of the State District Court affirmed by the Minnesota Supreme Court are unpublished and are set out in the Appendix at p. A-18. The Findings of Fact, Con-

clusions of Law and Order of the Minnesota Public Utilities Commission are unpublished; the relevant portion is set out in the Appendix at p. A-44.

JURISDICTION

The initial Opinion of the Minnesota Supreme Court was filed on December 9, 1983. A timely petition for rehearing was filed. On January 27, 1984, a modified opinion was filed by the Court, and the petition for rehearing was otherwise denied and judgment entered on that date.[1] In this case, the Minnesota Supreme Court, the highest state court in Minnesota, held that a decision by the Minnesota Public Utilities Commission was, under the Federal Power Act, preempted by a wholesale rate determination of the Federal Energy Regulatory Commission. This petition is being docketed with this Court within 90 days from the entry of the Court's judgment and order denying petition for Rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. § 1257(3) (1966).

STATUTES INVOLVED

16 U.S.C.A. § 824 (1974, 1984 Supp.).

> (a) It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and

[1]Petitioner seeks review of the Minnesota Supreme Court's second decision, set forth in its opinion of January 27, 1984. The December 9, 1983, opinion is not printed in the Appendix. The second opinion differs from the first only in the addition of footnote 11 of the opinion, Appendix at A-9.

subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the states.

(b) (1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not allow to any other sale of electric energy. . . .

(c) For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy as wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

. . . .

STATEMENT OF THE CASE

This case arose from an appeal by Northern States Power Company ("NSP") of an order of the Minnesota Public Utilities Commission ("MPUC") which disallowed recovery from Minnesota retail ratepayers of losses which arose from the abandonment of a proposed nuclear power plant project.

NSP is a Minnesota corporation which serves wholesale and retail electric customers in Minnesota, North Dakota, South Dakota and Wisconsin. In 1970, in response to Wis-

consin law, NSP separately incorporated its Wisconsin operations under the name of Northern States Power Company of Wisconsin ("NSP-W"). NSP-W became a wholly-owned subsidiary of NSP. The two companies, NSP and NSP-W, continued to supply electricity via an integrated system of generation and transmission facilities serving the four states in the same manner as before the separate incorporation of NSP-W.

In 1973, NSP petitioned the Wisconsin Public Service Commission for permission to build the Tyrone Energy Park nuclear power plant in western Wisconsin. In October, 1979, the Wisconsin Public Service Commission denied the petition. NSP appealed the order denying the petition. NSP appealed on the ground that the "needs test" employed by the Commission emphasized only western Wisconsin needs and ignored that the plant was to be part of an integrated system.[3] NSP officials felt that a need had been demonstrated.[4] Their opinion in this respect was corroborated by the fact that after denying the certificate for the nuclear plant, the Wisconsin Commission immediately ordered NSP to plan a coal-fired plant at the same site.[5]

NSP abandoned its appeals, however, and sought an expeditious means of passing on its losses, which amounted to approximately $75 million, to consumers. This staggering sum was spent by NSP on the project prior to securing the basic regulatory approval (the certificate of need) from the Wisconsin Commission. About half of this amount represented penalty clause payments to vendors and con-

[3]NSP Exh. 98 at 11; Jensen XXXII at 196. References to the record herein are to the exhibits and transcripts of testimony in the Minnesota Public Utility Commission retail rate proceeding.
[4]Hong XXXII at 224-226.
[5]Jensen XXXII at 201-202.

tractors under contracts which failed to contain provisions negating the penalty clauses if the certificate of need were denied. NSP sought to avoid having the burden of this loss fall on its shareholders. It therefore sought to pass on these losses to consumers and in a manner that would avoid state utility commission scrutiny. To do so, it sought to take advantage of an agreement—known as the "Coordinating Agreement"[4]—that it had with its wholly-owned subsidiary NSP-W.

This agreement was created when NSP and NSP-W became separate corporations in 1970 and was filed with the Federal Power Commission[5] the same year. It was necessary then since although the two became separate corporations, they continued to engage in the same business as before—supplying electricity to the four states via an integrated system of generation and transmission facilities. The agreement was part of the necessary change in the integrated system's accounting system to reflect two corporate entities rather than one. It operates as an allocation formula to allocate between NSP and NSP-W such joint and fixed operating expenses of the two as are approved by the appropriate ratemaking authorities—the Federal Energy Regulatory Commission ("FERC") in the case of wholesale rates, state commisisons in the case of retail rates.

NSP petitioned FERC that the Coordinating Agreement be amended to allocate the Tyrone loss between the companies on the same basis as other costs (87% to NSP and 13% to NSP-W). NSP did not file its petition as a wholesale rate change. FERC accepted the amendment and

[4]The Coordinating Agreement is reproduced in the Appendix at p. A-49.
[5]The Federal Power Commission was predecessor to the Federal Energy Regulatory Commission.

scheduled a hearing on it. The MPUC intervened in the proceeding in which FERC was to consider the amendment as did several other state commissions. The intervenors asserted *inter alia* that the Coordinating Agreement, even if so amended, would not in any way dictate state retail ratemaking consequences nor would it require state commissions to accept the Tyrone losses in any particular fashion in those retail proceedings. The Administrative Law Judge who presided over the hearing for FERC approved NSP's proposed allocation but expressly noted that his decision did not determine the ratemaking consequences at either the wholesale or retail level:

> [S]uch allocation *may not* automatically govern the ratemaking consequences either at the federal (resale rates) or state (retail rates) level.[7]

The judge went on to note NSP's acceptance of this fact:

> In recognition of this, NSP states that it is willing to make such reports and filings which the federal and state regulatory bodies may require, within their jurisdictional authority, to reflect the allocation of the loss between the two companies in their respective resale and retail rates.[8]

His recommendation was ultimately accepted by FERC and the amendment approved.

NSP then petitioned MPUC for a rate increase. NSP argued in that rate proceeding that FERC's approval of the amendment to the Coordinating Agreement constituted the approval of a "wholesale" rate. Consequently, NSP asserted. the MPUC was preempted from examining any

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[7]Northern States Power Company, No. ER 79-616, 13 F.E.R.C. (CCH) ¶ 63,049 at 65288 (Dec. 4. 1980) (footnote omitted) (emphasis added).
[8]*Id.*

individual cost items allocated to NSP by the Coordinating Agreement since these were FERC approved wholesale charges. The MPUC was therefore, according to NSP, required to allow the abandonment losses to be imposed upon retail customers.

The MPUC, in its Order dated April 30, 1981, found that the Coordinating Agreement was not a wholesale rate, that there was no federal preemption, and that the Tyrone losses should not be reflected in Minnesota retail rates.

NSP appealed MPUC's order to the Ramsey County (Minnesota) District Court. On August 3, 1982, the District Court issued its order reversing the decision of the MPUC. The District Court concluded that the Coordinating Agreement was a wholesale rate and therefore that under the Federal Power Act, the Tyrone abandonment losses must be automatically included in NSP's retail rates. This order was appealed to the Minnesota Supreme Court which affirmed the lower court's order.

REASONS FOR GRANTING THE WRIT

The Minnesota Supreme Court has decided a federal preemption question in a manner that conflicts with decisions of this Court which establish a clear federal/state division of authority to establish electric utility rates. Under that division, wholesale utility ratemaking is the function of FERC and retail ratemaking is the function of the states.

The Minnesota Supreme Court has erroneously treated an accounting arrangement—a cost allocation agreement between a utility and its wholly-owned subsidiary—as a FERC-established wholesale utility rate. The court found accordingly that costs allocated under the formula became

wholesale charges pursuant to a wholesale rate and as such could not be independently reviewed by MPUC in setting retail rates. The Minnesota court has drastically altered the federal/state balance with large financial consequences for retail ratepayers in Minnesota. It has also created a precedent under which a new mechanism for evading state regulation is created. The holding offers a mechanism whereby any utility, by separately incorporating its generating and transmission operations in a number of subsidiary companies and then establishing FERC-filed coordinating agreements with them, may circumvent traditional State retail utility rate regulation. If allowed to stand in an area of law where precedents are few and state supreme court opinions are afforded much persuasive value, it will sound the death knell for state regulation of utility rates.

THE FEDERAL POWER ACT DOES NOT PERMIT AN ELECTRIC UTILITY TO EVADE STATE REGULATION OF ITS RETAIL RATES BY SEPARATELY INCORPORATING PART OF ITS GENERATION AND TRANSMISSION SYSTEM IN A WHOLLY-OWNED SUBSIDIARY AND OBTAINING FEDERAL ENERGY REGULATORY COMMISSION APPROVAL OF A COST SHARING AGREEMENT BETWEEN THE UTILITY AND THE SUBSIDIARY AS A WHOLESALE RATE.

The error of the Minnesota Supreme Court in finding the Coordinating Agreement to be a wholesale rate is one of both law and policy. It ignored clear pronouncements of this Court and Congress concerning the division of utility ratemaking authority between FERC and the states. It also ignored the policy consequence of a finding that cost

allocating contracts between utilities and wholly-owned subsidiaries can be FERC-approved wholesale rates preemptive of state jurisdiction. Simply put, the consequence is the end of most state utility ratemaking jurisdiction. If such contracts are rates, utilities can easily convert themselves from a single corporation to a cluster of affiliates owned by a parent. Those affiliates would be linked together with contracts covering all items of cost, expense and investment which, under the rationale of the Minnesota court, when approved by FERC would become wholesale rates that could not be independently reviewed by state commissions.

A. Congress And Decisions Of This Court Have Established A Bright Line Limiting FERC Jurisdiction To Wholesale Rates And Leaving All Authority Over Retail Ratemaking To The States.

As this Court has recently recognized, regulation of utilities is "one of the most important of the functions traditionally associated with the police power of the states." *Arkansas Electric Coop. Corp. v. Arkansas Public Service Commission*, —— U.S. ——, 103 S.Ct. 1905, 1908 (1983). On the other hand, also important is the effect which uncontrolled state regulation could have on interstate commerce and broader national interests. *Id.* In balancing these interests, this Court early in the century developed a "bright line" test under which retail regulation was left to the states and wholesale rate regulation became the function of the federal government. The Court adopted such a test because the jurisdiction of each was easily ascertainable under it, making a case-by-case analysis unnecessary.

Congress, in the Federal Power Act ("FPA"), adopted the same division of authority. In the FPA, Congress asserted federal regulatory authority over certain wholesale sales of electricity and left the remaining authority to the states. 16 U.S.C.A. § 824 *et seq.* (1974, 1984 Supp.). The FPA unambiguously leaves retail ratemaking to the states, while limiting federal jurisdiction to wholesale sales in interstate commerce. The statutory policy is stated in Section 201 of the Act:

> (a) It is declared . . . that Federal regulation of matters relating to generation . . . and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy *at wholesale* in interstate commerce is necessary in the public interest, *such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.*
>
> (b) (1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy *at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy. . . .*

16 U.S.C.A. § 824(a) and (b) (1) (1974, 1984 Supp.) (emphasis added).

Decisions of this Court interpreting the Federal Power Act have described this division as "a *bright-line* easily ascertained, between state and federal jurisdiction." *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964) (emphasis added); *see Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, —— U.S. ——, 103 S. Ct. at 1909

(1983). The states are left with authority to regulate prices for retail sales to the ultimate consumer and the jurisdiction of FERC is limited to regulate prices for wholesale sales where the electricity would eventually be resold to the end user. *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. at 214-15; *Federal Power Commission v. Conway Corp.*, 426 U.S. 271, 277-78 (1976).

Ignoring these statements of Congressional and judicial policy that the jurisdiction of FERC is limited and does not extend to areas regulated by the states, the Minnesota Supreme Court reached the astonishing conclusion that "FERC's jurisdiction is *plenary*" and that MPUC's jurisdiction is "*limited* to regulation of intrastate retail rates."[9] Further ignoring the bright line, the Minnesota Court found that the Coordinating Agreement between NSP and NSP-W was a wholesale rate. The Court's reasoning and analysis as to why the agreement was a rate are not evident from its opinion. Instead of conducting an analysis, the Court placed great reliance upon the labels that had been attached to the Coordinating Agreement by others. It attached significance to the fact that FERC accepted the Coordinating Agreement as a "rate schedule".[10] The Court did not, however, describe what its conclusions were from this fact. Indeed, it could not conclude from the fact that the agreement was filed as a rate schedule that it was a wholesale rate. The two terms simply are not synonymous. Where utilities such as NSP and NSP-W are engaged in the interchange of power transmitted in interstate commerce they are required to file and obtain approval from

[9]Northern States Power Company v. Minnesota Public Utility Commission, No. CX-82-1130, C1-82-1131, CX-82-1354, slip. op. at 7-8 (Minn. S.Ct., Jan. 27, 1984), Appendix p. A-8, 9.

[10]*Id.*, slip op. at 10, Appendix at A-12.

FERC of virtually any agreements between them. FERC treats all such filings as "rate schedules", but not all rate schedules are wholesale rates. The definition of a rate schedule in FERC regulations demonstrates this.[11] Under this broad definition a "rate schedule" includes not only "wholesale rates" for customers, but also interconnection and interchange agreements, transmission agreements, wheeling rates, and automatic adjustment and purchase gas adjustment clauses. Clearly not every rate schedule constitutes a wholesale rate. A wholesale rate is but one kind of rate schedule. It is apparent therefore why the Minnesota Supreme Court left its analysis dangling and did not conclude that for this reason the agreement was a wholesale rate. The remainder of the Minnesota Supreme Court's analysis consists of allusions to remarks about the Coordinating Agreement made by FERC in other proceedings.[12] In short, the Minnesota Supreme Court did not meaningfully analyze the issue of whether the agreement is a wholesale rate, either as a matter of law or policy.

Having found the Coordinating Agreement to be a wholesale rate the Minnesota Supreme Court concluded that it preempted state jurisdiction. In finding the agreement to be something which it is not, a wholesale rate, the Minnesota Supreme Court has upset the delicate bright line balance which Congress and the opinions of this Court have long recognized. The enormity of the Minnesota Supreme Court's error can be seen from examining what the Coordin-

[11] 18 CFR § 35.2(b) (1983) provides *"Rate Scedule.* The term "rate schedule" as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, regulations or contracts which in any manner affect or relate to the aforementioned service, rates, and charges. . . ."

[12] Northern States Power Company v. Minnesota Public Utility Commission, *supra* note 9, slip. op. at 10-12, Appendix at A-12-17.

ating Agreement really is. If such a general open-ended cost-sharing formula is a wholesale rate it will become the prototype for agreements between utilities and their subsidiaries all over the country whose purpose is to evade state jurisdiction.

B. The Coordinating Agreement Is Not A Wholesale Rate.

1. The Agreement Is An Accounting Mechanism For Allocating Costs Of Operating An Integrated Electric Power System Between A Utility And Its Wholly-Owned Subsidiary And Nothing More.

The NSP Coordinating Agreement is a simple cost allocation formula. It is not, nor does it establish, a wholesale rate for the resale of power. It is unlike a wholesale rate in purpose.

The purpose of the Coordinating Agreement is to merely allocate for accounting purposes such overall costs of operating the integrated system as the appropriate regulatory authority—FERC in the case of wholesale rates and state commissions in the case of retail rates—allows. Its purpose is to assure that the cost is shared proportionately among all jurisdictions where the system operates. It does so by allocating costs of operation of the integrated system among the affiliates on the basis of participation or energy ratios. These ratios are based on the ratio of one affiliate's needs (for resale to wholesale or retail customers) to the needs of the total system. The formula merely serves as a means of division of such costs as are approved to be passed on to wholesale or retail rate payers. State

utility commissions such as MPUC are thus bound by FERC's determination of the cost division but are not bound to accept the costs themselves.

2. The Coordinating Agreement Cannot Be A Wholesale Rate Because It Does Not Involve Wholesale Sales.

To be a wholesale rate the Coordinating Agreement must somehow relate to a wholesale sale. The "sale of electric energy at wholesale" is expressly defined in the Federal Power Act and has no mystical meaning. It is defined as "a *sale* of electric energy to any person for resale". 16 U.S.C.A. § 824(d) (1974) (emphasis added). The Coorginating Agreement does not, however, describe any legitimate sales transactions between NSP and NSP-W as buyer-seller. It instead describes an accounting arrangement between the two affiliates.

If the Coordinating Agreement did really describe a seller-buyer relationship, rather than an accounting arrangement, one would expect it to contain specific price terms like wholesale rate tariffs do. See NSP wholesale tariff for municipalities, Appendix at A-135. The Coordinating Agreement contains no comparable price terms. The agreement merely describes broad categories of fixed and variable costs and contains the formula for how they are to be shared by the two companies. This general formula is not a price and not a rate. To assert that such a general formula is a rate would leave unfettered discretion as to what costs are flowed through it and the corresponding actual price to NSP alone, without regulatory examination of those costs. To permit this would produce a de facto deregulation of the utility industry violative of the intent

of Congress in enacting a regulatory scheme in the Federal Power Act to require independent review of utility rates. See *Pacific Gas Transmission Co. v. Federal Power Commission*, 536 F.2d 393, 396 (D.C. Cir. 1976) (formula rate unlawful as abdication of Commission authority since it would inevitably rubberstamp unjust and unreasonable rates fixed by Canadian authorities).

If indeed there was a wholesale buyer-seller relationship between NSP and NSP-W one could have expected that the formula would have been treated by NSP as a FERC-approved rate in the past. It has not. In the retail ratemaking setting, NSP has submitted to states for their independent review individual items of expense even though those items were divided between the two companies under the Coordinating Agreement formula. For example, in another plant abandonment situation (the SHERCO IV plant project abandoned in 1978), NSP merely got "accounting approval" by letter from FERC to book the loss to a particular account. FERC expressly noted in its letter that its approval did not determine ratemaking consequences."[13] NSP then submitted NSP-W's allocation of the loss to the Wisconsin Commission for its independent review prior to inclusion in Wisconsin retail rates. As another example, items of investment have also been independently reviewed by the state commissions even though they were allocated under the agreement. *E.g., Northern States Power Co.*, No. ER-2-1, 11 P.U.R. 4th 385, 400-401 (Minn. P.S.C. 1975) (rate of return on investment determined independently by Minnesota Commission). Similarly, in the wholesale ratemaking setting, FERC has not allowed NSP to automatically flow through to wholesale

[13]Bruder XXXII:72.

ratepayers all costs and expenses even though they were allocated under the agreement. To the contrary, items of expense are reviewed individually in a rate tariff proceeding. *See e.g., Northern States Power Company (Wisconsin)*, No. ER 80-653, 17 F.E.R.C. (CCH) ¶ 61,291 (Dec. 3, 1981) (expenses disallowed even though allocated under the agreement).

In summary, the Coordinating Agreement is no wholesale rate pertaining to wholesale sales at all. It is merely an allocation formula—an accounting mechanism of a consolidated utility company consisting of a parent company and its wholly-owned subsidiary.

When FERC considered the very amendment to the coordinating agreement here at issue, the Administrative Law Judge recognized as much. The judge said,

> [A]llocation [of the Tyrone loss via the coordinating agreement] may not automatically govern the ratemaking consequences either at the federal (resale rates) or state (retail rates) level. In recognition of this, NSP states that it is willing to make such reports and filings which the federal and state regulatory bodies may require, within their jurisdictional authority, to reflect the allocation of the loss between the two NSP companies in their respective resale and retail rates.

Northern States Power Company, No. ER79-616, 13 F.E.R.C. (CCH) ¶ 63,049 at 65288 (Dec. 4, 1980) (footnote omitted). FERC affirmed this portion of the administrative law judge's decision without opinion and in so doing has similarly recognized that the Coordinating Agreement is not a rate at all but is rather a general allocation formula which assumes that proper applications to state and feder-

al regulatory authorities will be made when NSP seeks to justify passing on particular items of cost and expense to ratepayers, albeit that they will be passed on in the percentages designated by the coordinating agreement.

Very clearly, the coordinating agreement is not a wholesale rate at all but is a mere allocation formula.

C. National Utility Regulatory Policy Is Defeated If A Cost Allocation Agreement Between A Utility And Its Wholly-Owned Subsidiary Is Deemed A Wholesale Rate Whose Approval By FERC Preempts State Jurisdiction.

The Federal Power Act is based on a fundamental policy that consumers deserve regulatory oversight of utility ratemaking. A delicate balance exists between what the federal government regulates and what the state governments regulate. The judgment of Congress in enacting the Federal Power Act, consistent with the judgment of this Court in its pre-Federal Power Act decisions, was that states are best equipped to address retail utility ratemaking concerns.

Yet the decision of the Minnesota Supreme Court stands that tradition on its head and endorses FERC usurpation of retail rate-setting functions upon the absolute fiction that a cost allocation agreement between a utility company and its wholly-owned subsidiary is a FERC-regulated wholesale rate.

The pernicious consequences of this finding are clear in this case. The Minnesota Commission was precluded from exercising its regulatory oversight in a retail ratemaking proceeding in a matter involving a substantial $75 million expense. Yet the consequences of this decision go beyond this case.

The consequences of the Minnesota Court's decision are already upon the public in another context. NSP has been quick to assert that it can insert a rate of return factor in the Coordinating Agreement. NSP's objective in so doing is to pass on a given rate of return automatically through the Coordinating Agreement as an item of expense and thereby deprive the Minnesota Public Utilities Commission of its ability to determine whether it is a reasonable rate of return in a retail ratemaking setting. The rate of return issue is one that has traditionally been left, in the retail ratemaking setting, to state commissions. NSP's attempt to include a rate of return in the Coordinating Agreement was challenged by the State of Minnesota before FERC. FERC rejected the state's arguments and its decision is now on appeal before the 8th Circuit. *See State of Minnesota v. Federal Energy Regulatory Commission*, U.S. Ct. App., 8th Cir., Files No. 83-1745, 83-2271.

The future application of this particular Coordinating Agreement as a device to circumvent state regulatory authority is confined only by the limits of the imaginations of NSP's attorneys. Pursuant to the Minnesota Supreme Court's reasoning, virtually any item of cost, expense, or investment could be passed through the Coordinating Agreement to the preclusion of the Minnesota Commission's independent consideration of it in a retail ratemaking proceeding.

The precedent created by the Minnesota Supreme Court opinion, moreover, goes well beyond this particular case and this particular coordinating agreement. Utility companies operating integrated systems will now immediately see the advantage of establishing affiliates. Numerous contracts and agreements will then be created between the

affiliates which will deal with most or all of the costs, expenses and investment aspects which have traditionally been the subject of state retail utility ratemaking. In short, all will be a wholesale rate determined by FERC. There will be nothing left for state retail ratemaking determination.

This scenario is obviously incompatible with the purpose of the Federal Power Act and the concepts of federalism recognized in it.

CONCLUSION

The holding of the Minnesota Supreme Court will have national implications in the small world of utility regulation in which state court decisions are acknowledged by the utilities bar as having country-wide significance. The Minnesota Supreme Court's decision should not be allowed to obliterate the utility regulation bright line that this Court and Congress have created. Thus, the Petition for Certiorari should be granted; both to correct the result in this

case and to assure that the retail electric ratemaking authority of the states is preserved.

Dated: April 23, 1984.

Respectfully submitted,

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